SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1221-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RANDY J. HERNANDEZ,

Defendant-Appellant.

Argued December 21, 2016 – Decided January 19, 2017

Before Judges Simonelli and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Municipal Appeal No. 009-16-15.

Scott A. Gorman argued the cause for appellant.

Suzanne E. Cevasco, Assistant Prosecutor, argued the cause for respondent (Gurbir S. Grewal, Bergen County Prosecutor, attorney; Ms. Cevasco, of counsel and on the brief).

PER CURIAM

Following a trial de novo in the Law Division, defendant Randy Hernandez was convicted of driving while intoxicated (DWI), N.J.S.A. 39:4-50(a), and refusal to submit to a breath test

(refusal), N.J.S.A. 39:4-50.4. Defendant consented to the breath test, but then failed to complete it in a satisfactory manner, despite four opportunities to do so. The officer who administered the test concluded that defendant was blowing out the side of his mouth and thus intentionally failing to give an adequate breath sample.

Before us, defendant concedes his guilt on the DWI charge and challenges only his refusal conviction. Relying on State v. Foley, 370 N.J. Super. 341 (Law Div. 2003), he contends that, as a matter of law, he should not have been charged with refusal. Alternatively, he argues that the State failed to prove beyond a reasonable doubt that he knowingly refused to provide breath samples. Having considered defendant's arguments in light of the record and applicable legal standards, we affirm.

I.

Because defendant no longer challenges his DWI conviction, we focus on the facts and procedural history most pertinent to the refusal charge. Prior to trial in the Fairview Municipal Court, defendant filed a motion in limine seeking to exclude the Alcohol Influence Report (AIR). Relying on Foley, defendant argued that he could not be charged with refusal because he gave a breath sample of at least 0.5 liters. He further posited that the AIR could not be used as evidence that he was intentionally refusing

to take the breath test. After hearing oral argument on April 14, 2015, the municipal court judge denied defendant's motion.

The parties stipulated to fourteen paragraphs of facts at the ensuing June 10, 2015 municipal court trial. Notably, they stipulated that: (1) defendant operated a motor vehicle while under the influence of alcohol in Fairview on November 27, 2014; (2) Fairview Police Sergeant John Pierotti read defendant the standard statement regarding chemical breath tests, and defendant agreed to take the test; (3) defendant was afforded four opportunities to provide breath samples at Fairview Police headquarters; (4) according to the AIR, defendant's penultimate attempt to provide a breath sample resulted in a sample that was 1.6 liters in volume and 4.0 seconds in duration; (5) according to the AIR, defendant's final attempt resulted in a sample that was 1.1 liters in volume and 3.0 seconds in duration; and (6) Pierotti terminated the testing after defendant's fourth attempt, even though he could have afforded defendant seven more opportunities to provide an adequate breath sample.

In addition to the stipulated facts, the State presented the testimony of the Alcotest operator, Pierotti. Pierotti testified that, before each test, he read defendant the instructions on how to provide a proper breath sample and defendant indicated he understood the instructions. On the first, second and fourth

tests, defendant failed to provide the minimum volume needed to analyze the breath sample. Defendant's third attempt failed because "the blowing time was too short." Although Pierotti could have afforded defendant seven more opportunities, he chose to terminate the testing after defendant's fourth attempt. He explained:

> I [] stopped the test. In my opinion, [defendant] was trying to circumvent the test to get the full breath sample in by blowing — the one time, it was too short. And the other three, outside of the mouthpiece, so the full sample would not enter the valve piece and therefore, the Alcotester.

The AIR was admitted in evidence at trial as a joint exhibit. It showed that defendant's air volumes were 0.1, 0.0, 1.6, and 1.1 liters, over 0.8, 0.2, 4.0, and 3.0 seconds, respectively. The AIR also confirmed that the minimum volume was not achieved on defendant's first, second and fourth tests, and that defendant's blowing time was too short on his third test. Defendant did not testify or call any witnesses.

The municipal court judge found Pierotti's testimony credible. The judge credited Pierotti's observations that defendant did not fully blow into the tube and failed to provide an adequate breath sample on any of the four tests. Therefore, he found defendant guilty of "refus[al] to take the Alcotest as a result of the short samples." The court imposed a seven-month

loss of license, an ignition interlock, and appropriate fines, costs, and penalties.

At the Law Division trial de novo, Judge James J. Guida also found defendant guilty of refusal. In a thorough oral opinion, Judge Guida rejected defendant's continued reliance on the directive in Foley, supra, 370 N.J. Super. at 354, that until the State made changes to the firmware parameters for the Alcotest breath testing instrument, no person who delivered a breath sample of 0.5 liters could be charged with refusal. The judge noted that the holding in Foley "was clearly limited to firmware [v]ersion 3.8, which was not the version in use when [] defendant was arrested." He further noted that our Supreme Court's subsequent decision in State v. Chun, 194 N.J. 54, 152, cert. denied, 555 U.S. 825, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008), established a minimum volume requirement of 1.5 liters and a minimum blowing time of 4.5 seconds.

Judge Guida also found "no requirement that an officer conduct a full battery of [eleven] tests on an Alcotest machine" before charging a defendant with refusal. The judge accepted Sgt. Pierotti's testimony that "he had his hand over the mouthpiece, outside of the mouthpiece, and . . . felt the air blowing into his hand." Accordingly, the judge concluded the State had proved beyond a reasonable doubt that defendant intentionally attempted

to avoid the Alcotest. The judge imposed the same sentence as the municipal court. This appeal followed.

On appeal, defendant presents the following point for our review, which essentially encompasses the arguments he previously raised in the Law Division:

> THE [TRIAL] COURT ERRED WHEN IT FOUND DEFENDANT GUILTY OF REFUSAL BECAUSE THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO ESTABLISH, BEYOND A REASONABLE DOUBT, THAT DEFENDANT KNOWINGLY REFUSED TO PROVIDE ADEQUATE BREATH SAMPLES FOR ANALYSIS WHEN TWO OF THE SAMPLES THAT HE PROVIDED WERE GREATER THAN SEVENTY PERCENT OF THE MINIMUM VOLUME FOR ANALYSIS.

II.

In reviewing a trial court's decision on a municipal appeal, we determine whether sufficient credible evidence in the record supports the Law Division's decision. State v. Johnson, 42 N.J. 146, 162 (1964). Unlike the Law Division, which conducts a trial de novo on the record, R. 3:23-8(a)(2), we do not independently assess the evidence. State v. Locurto, 157 N.J. 463, 471 (1999). In addition, under the two-court rule, only "a very obvious and exceptional showing of error" will support setting aside the Law Division and municipal court's "concurrent findings of facts[.]" Id. at 474. However, where issues on appeal turn on purely legal determinations, our review is plenary. State v. Adubato, 420 N.J. Super. 167, 176 (App. Div. 2011) (citing Manalapan Realty, L.P.

v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)), certif. denied, 209 N.J. 430 (2012).

Applying this standard of review, we affirm defendant's conviction substantially for the reasons set forth in Judge Guida's cogent oral opinion. We add the following comments.

"The Alcotest is a breath-testing device, manufactured and marketed by Draeger Safety Diagnostics Inc. (Draeger), which was first utilized in New Jersey as part of a pilot project in Pennsauken." Chun, supra, 194 N.J. at 66. It relies on pre-loaded software (firmware) and utilizes both infrared technology and electric chemical oxidation in a fuel cell to measure breath alcohol content. Id. at 78. The current version of the firmware is version 3.11, which was implemented after the Foley court found that firmware version 3.8 unacceptably created an extremely high refusal rate. Id. at 113; Foley, supra, 370 N.J. Super. at 352-54.

Before an Alcotest can be used on a subject, it conducts a control "blank air" test to determine if there are chemical interferents in the room; if there are, the device is programmed so that the test cannot continue. Chun, supra, 194 N.J. at 80. Assuming the blank air test is acceptable, the Alcotest prompts the operator to collect a breath sample. Ibid. Lights on an LED screen and a programmed sound notify the operator if the sample

meets the minimum criteria. Id. at 81. As noted by Judge Guida, the relevant minimum criteria under Chun are (1) a volume of at least one and one-half liters; and (2) a blowing time of at least four and one-half seconds. Id. at 152. After a valid sample is given, the Alcotest locks out the operator for two minutes, performs another blank air test to clear the sample, and then prompts the operator to collect another sample. Id. at 81. Two valid samples within an acceptable range of tolerance are required to produce an acceptable result; the operator has a maximum of eleven attempts to collect the two valid samples. Ibid. After eleven failed tests, the two options available to the operator are to terminate testing or report refusal. Ibid.

As defendant correctly argues, the Foley court found a serious problem with Alcotest firmware version 3.8, which was used during the initial 2001-2002 test program in Pennsauken. 370 N.J. Super. at 345. However, in response to the holding in Foley, the State asked Draeger to make changes to the firmware. Special Master's Findings & Conclusions Submitted to the Supreme Court 29 (Feb. 13, 2008). Laboratory tests were conducted from July to September 2004, and shortly thereafter Draeger delivered firmware version 3.11 to the State. Id. at 30. More tests were performed to determine if the firmware complied with the National Highway

Transportation Safety Agency's model specifications, which it did. Ibid.

As Judge Guida aptly recognized, Foley's holding was thus clearly limited to firmware version 3.8, which was not the version in use when defendant was arrested and tested. The Chun Court squarely held that one and one-half liters is the minimum volume necessary to generate a valid test, with the exception of women over the age of sixty, when using Alcotest models with firmware version 3.11. Chun, supra, 194 N.J. at 152. As a result, we find no merit in defendant's argument that providing a sample of one-half liter precludes a refusal conviction under Foley.

We further conclude that the record supports Judge Guida's determination that defendant refused to complete the breath test. It is well established that "anything substantially short of an unconditional, unequivocal assent to an officer's request that the arrested motorist take the [breath] test constitutes a refusal to do so." State v. Widmaier, 157 N.J. 475, 488 (1999) (quoting State v. Bernhardt, 245 N.J. Super. 210, 219 (App. Div.), certif. denied, 126 N.J. 323 (1991)). "[A] defendant's subjective intent is irrelevant in determining whether the defendant's responses to the officer constitute a refusal to take the test. . . . [A] motorist has no right to delay a [breath] test." Id. at 498. Two failures to provide an adequate breath sample have been found

sufficient to constitute refusal despite a verbal agreement by the defendant to submit to a breath test. In re Kallen, 92 N.J. 14, 17-18 (1983). See also State v. Schmidt, 206 N.J. 71, 87 (2011) (sustaining defendant's refusal conviction for failing to provide proper breath samples).

Applying these principles here, we discern no basis to disturb the judge's determination that defendant intentionally refused to submit to the breath test following his arrest. Although defendant said he would submit to the breath test, he clearly failed to do so. We also note that defendant has not advanced any claim that he suffered from some physical impairment that prevented him from giving a sufficient breath sample, in which event it would be his burden to prove the existence of such impairment. See State v. Monaco, 444 N.J. Super. 539, 551-53 (App. Div. 2016).

Affirmed.